

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No.: 2:11-cv-11618
)	
v.)	
)	Judge: Robert H. Cleland
)	(presiding)
COULOMB MEDIA, INC.,)	
a corporation, and)	
)	Laurie J. Michelson
CODY LOW aka JOE BROOKS,)	(referral)
an individual and an officer)	
of COULOMB MEDIA, INC.,)	
)	
Defendants.)	

**PLAINTIFF’S MOTION FOR A TEMPORARY RESTRAINING ORDER WITH
OTHER EQUITABLE RELIEF AND ORDER TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Plaintiff Federal Trade Commission (Commission) moves pursuant to Rule 65(b) of the Federal Rules of Civil Procedure for a Temporary Restraining Order with Other Equitable Relief and Order to Show Cause Why a Preliminary Injunction Should Not Issue.

As described in the Commission’s Complaint for Permanent Injunction and Other Equitable Relief, Defendants hold themselves out on several Internet Websites as representing a legitimate news organization that has investigated the weight-loss properties of a dietary supplement known as acai berry, as well as other products. In fact, Defendants are not a legitimate news organization and hav not investigated acai berry or other products they promote. Rather, Defendants are paid a commission by luring unsuspecting consumers onto Websites of merchants who sell acai berry and other products and services. Moreover, acai berry products do

not promote weight loss and consumers who are misled lose hundreds of dollars. To put an immediate stop to these practices, the Commission asks that the Court schedule a hearing on this Motion as soon as practical.

WHEREFORE, the Commission brings this Motion. Along with this Motion, the Commission files its proposed Temporary Restraining Order and its proposed Order Scheduling a hearing on this Motion.

Date: April 15, 1022

Respectfully submitted,

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Defendants.)	

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING
ORDER WITH OTHER EQUITABLE RELIEF AND ORDER TO SHOW CAUSE WHY
A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Concise Statement of the Issues Presented

1. Whether Defendants, who repeatedly make false claims on their Internet websites by exaggerating the weight-loss properties of a dietary supplement known as acai berry, and by misrepresenting other weight-loss products, violate Section 12 of the Federal Trade Commission Act, 15 U.S.C. § 52, which prohibits false claims for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of food products.

2. Whether Defendants, who repeatedly make false claims on their Internet websites by claiming that they are a legitimate news organization that has investigated the weight-loss properties of acai berry among other products and services, and have not adequately disclosed their connection with the merchants that sell those products and services, violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices.

3. Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) empowers this Court to issue injunctive relief stopping these practices and preserving assets pending a final adjudication on the merits.

Most Appropriate Authority for the Relief Sought

Section 13(b) of the Federal Trade Commission Act provides that “in proper cases the Commission may seek, and after proper proof, [a District Court] may issue, a permanent injunction” for violations of the FTC Act. 15 U.S.C. § 53(b). At least one Court in this District has found this grant to invoke the whole range of the Court’s equitable powers, including the power to grant provisional relief. *FTC v. Solar Michigan*, No. 86-cv-40368-FL, 1988 U.S. Dist. LEXIS 16797 at *2, (E.D. Mich. Sept. 27, 1988) (citing *FTC v. H. N. Singer, Inc.*, 688 F.2d 1107, 1113 (9th Cir. 1982) and *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984)). In fact, as is discussed in this memo, many Courts have taken this position.

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I. INTRODUCTION

Defendants Cody Low and Coulomb Media, Inc. (collectively, Low), have hosted dozens of fake-news websites designed to lure consumers into buying expensive but worthless products, often a weight-loss product called acai berry. In the Internet vernacular, Low's business model is known as affiliate marketing, and Low is known as an affiliate.¹

Basically, affiliates advertise merchants' products on the Internet with banner advertisements, websites, or both, that contain links to the merchants' order page. The merchant in turn compensates the affiliate based on either the volume of sales realized or on the number of visitors the affiliate manages to drive to the order page. In contrast to legitimate internet advertisers who engage in affiliate marketing, Low uses fraudulent websites purporting to be news outlets and claiming to have done investigations into the weight-loss properties of acai berry. A "reporter" claims to have tried the product herself and to have achieved remarkable results in a short time with no special diet and no strenuous exercise. Consumers are then offered links to merchant sites where they are offered free trial offers for acai berry and a colon cleanse product.

In fact, as will be discussed in greater detail in Section III, everything about Low's websites is fake. Dr. Robert F. Kushner, an expert in clinical nutrition at Northwestern University, has filed a declaration in support of this motion offering his opinion that consuming acai berry will not cause weight loss, and that the only healthy way to lose weight is by burning

¹ For a discussion of affiliate marketing, see generally *1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591CW, 2010 U.S. Dist. LEXIS 132389 (D. Utah Dec. 14, 2010); *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129, 134 (N.Y. App. Div. 2010).

more calories than one consumes, through diet and exercise.² The free trial, one learns by scrutinizing hard-to-read fine print, comes with a negative option requiring consumers to cancel to avoid charges to their credit cards, typically \$149 per product.³ And, of course, there is no investigative reporting. Rather, Low's websites contain stock images that can easily be found on the Internet. In fact, one reporter Low frequently features is actually a French anchorwoman, but images for that person, including the ones Low features, can be found on hundreds of different websites. Low identifies her with no fewer than five different names, and shows her having investigated products from acai berry to wrinkle cream to penny auctions.⁴ Finally, Low's websites typically have a consumer testimonial section, but a simple Google search shows that comments made there are also stock comments that appear on countless other websites.⁵

While the extent of Low's ill-gotten gains will have to await discovery, the operation must be lucrative — one six-week campaign last year cost Low over \$57,000 in banner advertising.⁶ In all, the investigation here discovered over 100 domain names that Low has registered.⁷ Moreover, while not every domain name has a currently accessible website, and it is not known how many of the domain names have ever had associated websites, FTC investigators have captured about 30 websites associated with Low's domain names. Many are fake-news

² PX 4 ¶ 8 (Kushner Dec.) (“[I]t is my opinion that acai berries will not cause any weight loss absent a reduction in caloric intake or an increase in exercise.”); *see generally id.* at ¶¶ 8-11.

³ PX 1 Attach. F-1 (Kraus Dec.) (reproduced and discussed *infra* p. 6).

⁴ *Id.* at ¶ 9 and Attach. E-1 E-6; F-2.

⁵ *Id.* at ¶ 11.

⁶ *Id.* at ¶ 13; PX 3 ¶ 6 and Attach. A (McGuire Dec.).

⁷ PX 2 ¶ 7 and Attach. B (McBreen Dec.).

sites promoting acai berry as just described, but others promote other dubious products sometimes using the fake-news format, sometimes not such as other weight-loss products, penny auctions, and work-at-home set ups.⁸

These deceptive practices violate Section 5 of the Federal Trade Commission Act⁹ and constitute false claims under Section 12 of the Act.¹⁰ To stop them, the Federal Trade Commission seeks injunctive relief under Section 13(b) of the Act prohibiting further deception.¹¹ To prevent further consumer injury, the Commission also seeks a noticed temporary restraining order in advance of a preliminary-injunction hearing and as soon as practical.¹² Finally, to preserve the possibility of meaningful final relief, the Commission also seeks an asset freeze that would prohibit Low from making any extraordinary asset transfers, together with financial disclosures and an accounting.¹³

II. THE PARTIES

A. Plaintiff

The **Federal Trade Commission** (Commission or FTC), is an independent agency of the

⁸ See PX 1 Attach. E-3 E-6 and E-8 E-9 (Kraus Dec.).

⁹ 15 U.S.C. § 45(a).

¹⁰ 15 U.S.C. § 52.

¹¹ 15 U.S.C. § 53(b).

¹² The Commission intends to attempt service of this motion on both Defendants along with service of process.

¹³ This matter is one of ten cases filed by the FTC, five of which are being filed in the Northern District of Illinois, against persons and entities that sell acai berry dietary supplements and other products through deceptively formatted news websites.

United States government created by the Federal Trade Commission Act (FTC Act).¹⁴ Its responsibilities include enforcing the FTC Act's prohibition on deceptive acts or practices,¹⁵ and its prohibitions on false advertisements for food, drugs, devices, services, or cosmetics.¹⁶ Section 13(b) of the FTC Act authorizes the Commission to bring suit in district court to enjoin violations of laws it enforces and to secure other appropriate equitable relief.¹⁷

B. Defendants

Defendant **Coulomb Media, Inc.**, is a Michigan corporation with registered and mailing addresses at 776 Trombley Road, Grosse Pointe Park, Michigan, 48230. It was incorporated by Cody Low on May 12, 2010.

Defendant **Cody Low, aka Joe Brooks**, not only incorporated Defendant Coulomb Media but is also its registered agent. He resides at 776 Trombley Road in Grosse Pointe Park. Prior to incorporating Coulomb Media, dating back to at least July of 2009, Low had already established an account with Name.com, a domain name registrar.¹⁸ In paying for banner advertising on Facebook, an individual identifying himself as Joe Brooks made two credit card payments with a credit card ending in the same four digits, one showing an address in San Francisco, California, the other showing an address in Miami, Florida.¹⁹ Both of these addresses

¹⁴ 15 U.S.C. §§ 41-58.

¹⁵ 15 U.S.C. § 45(a).

¹⁶ 15 U.S.C. § 52.

¹⁷ 15 U.S.C. § 53(b).

¹⁸ PX 2 ¶ 6 (McBreen Dec.).

¹⁹ PX 3 ¶ 7 and Attach. B (McGuire).

have two things in common with Low's residential address: all three begin with the same house number, and all three end with the 48230 zip code for Grosse Point Park. In all likelihood, Joe Brooks is Cody Low.

III. LOW'S DECEPTIVE INTERNET SCHEME

Typical of Low's websites is the News 6 Reports site appearing at Kraus Attachment F-1.²⁰ That page has a masthead announcing "NEWS 6 REPORTS" and "Consumer Report Daily Health News." Below that is an unattributed quote saying "I Went From Flabby to Fabulous in Under 4 Weeks, Here's How" Below that, the site claims "AS SEEN ON: MSNBC[,] CNN[,] ABC[,] 60Minutes[,] BBC[.]" Then begins the "report." It starts by asking "It sounds impossible right? That's what I thought. So we at News 6 Reports decided to investigate. This report details our findings." The report then claims that Jane Clark, purportedly an investigative journalist, volunteered to be a guinea pig by trying acai berry, and concludes that "I Lost 25lbs in 4 Weeks, No Special Diet, No Intense Exercise." Throughout the report there are links to merchant websites about 18 links, many promising free trial offers followed by a section purporting to be viewer postings where consumers can supposedly leave messages sharing their experiences with acai berry. This is followed by a terms-and-conditions section with difficult-to-read fine print. The example chosen has a grey background, making it even more difficult to read, although some of the sites have fine print on a white background.

But if one can strain the eyes, or find a suitable magnifying glass, the contents of the terms and conditions are telling. These start by informing consumers that "[w]e are not affiliated

²⁰ As of April 11, 2011, the site was still accessible at www.new6reports.com. PX 1 ¶ 8 (Kraus Dec.). Note that although the page identifies itself as News 6 Reports, the "s" in news was omitted from the URL.

in any way with CNN, WebTV, News Channel 7, ABC, NBC, CBS, U.S. News or FOX. CNN, WebTV, News Channel 7, ABC, NBC, CBS, U.S. News, FOX, and Consumer Reports are all registered trademarks of their respective owners. ®” The second paragraph then takes away the clear impression made by the website that investigative journalism was performed:

It is important to note that this site and the stories depicted above is [sic] to be used as an illustrative example of what some individuals have achieved with this/these products. This website, and any page on the website, is based loosely off a true story, but has been modified in multiple ways including, but not limited to: the story, the photos, and the comments. Thus, this blog, and any page on this website, are not to be taken literally or as a non-fiction story. This blog, and the results mentioned on this blog, although achievable for some, are not to be construed as the results that you may achieve on the same routine. I UNDERSTAND THIS WEBSITE IS ONLY ILLUSTRATIVE OF WHAT MIGHT BE ACHIEVABLE FROM USING THIS/THESE PRODUCTS, AND THAT THE STORY DEPICTED ABOVE IS NOT TO BE TAKEN LITERALLY. This page receives compensation for clicks on or purchase of products featured on this site.

In this obscure fashion, Low admits that what is depicted on the website is simply not true. The terms and conditions continue by informing the consumer that a negative option is involved and that, as taken from the merchant’s website, if the consumer does not cancel within seven days:

we will charge the same card you provided at enrollment the non-refundable one-year membership fee of \$149.95 (“Membership Fee”). Then, beginning about thirty-two (32) days after we charge the Membership Fee to your card and every thirty (30) days thereafter, we will send you a fresh monthly shipment of the product and charge your card \$12.95 (“Monthly Charge”) when each supply ships.

It then repeats similar language for an “Advanced Cleanse” product.

Were that not enough, the website has at least two additional interesting features. One, on the first page on the right-hand side is an image of a person identified as Maria who purportedly lost 30 pounds with the acai and colon cleanse diet. Using the publicly available

reverse-image search engine called Tin Eye and found at <http://www.tineye.com>, one can upload that image, or insert the URL if the website is still accessible, and see that the exact same image appears on at least 17 other websites that appear to identify the person not as Maria, but as Sofia Vergara.²¹ A Google search on Vergara then shows that Ms. Vergara is, in fact, a model and actress who currently stars on a popular ABC television series.²² Had the creators of this website gotten permission to use this image, no doubt they would have featured Ms. Vergara's stardom rather than passing her off as a face in the crowd. To say that Ms. Vergara is not likely to have actually endorsed acai berry is a gross understatement.

Second, not only is the image of Ms. Vergara a stock image that anyone can download off the net, but so too are at least some, if not all, of the purported consumer testimonials in the purported blog section. While time does not permit an investigation into each testimonial, doing a Google search, with quotations marks, on the sixth entry, "I say BRAG AWAY...u have lots to brag about!! You GO GURL!! HOOT!", returns 47 results showing other places that the same exact quote has appeared on the Internet.²³ In other words, not only does the News 6 Website take away in fine print what it trumpets at the start, it is full of stock images and stock testimonials. It is fundamentally fraudulent.

Something similar is revealed by examining Low's other websites.²⁴ Compare the

²¹ PX 1 ¶ 10 and Attach. I-1 (Kraus Dec.).

²² *Id.* at ¶ 10.

²³ *Id.* at Attach. J.

²⁴ Low also promotes other weight-loss products, wrinkle cream, penny and surplus auctions, and work-at-home start-up kits. *See* PX 1 Attachments E-3 E-6 and E-8 E-9 (Kraus Dec.).

images found on the first page at Kraus Attachments E-1 E-6 and F-2. What appears to be the same person is identified variously as Helen Cohen, Julia Miller, Rebecca Scott, Amy Conner, and Johanna. Uploading any of these images on Tin Eye (or typing in the URLs to the extent the websites are accessible) will identify this person as Michelle Theuriau; a Google search on Ms. Theuriau reveals that she is an anchorwoman on French television. In fact, Ms. Theuriau's image has been compromised so frequently that she has generated an on-line news article from New Zealand entitled *The Face that launched a global ad scam*.²⁵

IV. ARGUMENT

Low's deceptive Internet scheme clearly violates the FTC Act. To prevent further consumer injury and to preserve the possibility for effective final relief for injured consumers, the Commission asks that this Court issue the proposed temporary restraining order. The order would prohibit Low's ongoing deceptive practices, prevent any extraordinary transfers of assets, and require an accounting of ill-gotten gains.

²⁵ PX 1 Attach. H (Kraus Dec.), available at www.stuff.co.nz/technology/digital-living/4138888/. The Commission recognizes that some of the evidence presented here is hearsay, particularly the on-line article regarding Ms. Theuriau. However, the guarantees of trustworthiness seem particularly high, and as this Court has recently recognized, "[a] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Smith v. State Farm Fire and Casualty Co.*, 737 F. Supp. 2d 702,707 (E.D. Mich. 2010) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981))). For this reason, courts in this jurisdiction and others have relied on hearsay materials in preliminary-injunction hearings. See, e.g., *Tenke*, 511 F.3d at 549 (affidavit); *State Farm*, 737 F. Supp. 2 at 709 (air quality assessment); *Guillemet v. Sec'y of Education*, 241 F. Supp. 2d 727, 740 (E.D. Mich. 2002) (affidavits and complaint allegations); see also *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3^d Cir. 2004) (citing multiple cases from other circuits). This principle can be no less applicable in the context of an application for a temporary restraining order to enforce federal law and preserve the possibility of effective final relief.

A. This Court Has the Authority to Grant the Requested Relief

To stop deceptive practices, Section 13(b) of the FTC Act provides that “in proper cases the Commission may seek, and after proper proof, the court may issue a permanent injunction.”²⁶ The statute applies to violations of “any provision of law” enforced by the FTC,²⁷ and courts have found that cases of routine fraud are proper cases.²⁸ Moreover, once the Commission invokes the Court’s equitable powers, it invokes the full range of the Court’s equitable powers including the power to issue orders to “preserve assets in order to make possible ultimate relief.”²⁹ This includes injunctive powers at the TRO stage.³⁰

B. A Temporary Restraining Order is Appropriate and Necessary

To grant preliminary injunctive relief in an FTC Act case, the district court need only determine the likelihood that the Commission will ultimately succeed on the merits, and balance the equities.³¹ Under this public-interest test, “it is not necessary for the Commission to

²⁶ 15 U.S.C. § 53(b).

²⁷ See *FTC v. H.N. Singer, Inc.*, 688 F.2d 1107, 1113 (9th Cir. 1982).

²⁸ *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988); *Singer*, 688 F.2d at 1111.

²⁹ *FTC v. Solar Michigan*, No. 86-cv-40368-FL, 1988 U.S. Dist. LEXIS 16797 at *2 (E.D. Mich. Sept. 27, 1988) (citing *Singer*, 688 F.2d at 1113 and *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir 1984)); see also *World Travel*, 861 F.2d at 1026; *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-19 (5th Cir. 1982); *FTC v. Renaissance Fine Arts, Ltd.*, 1994-2 Trade Cas. (CCH) ¶ 70,703 at 72,817 (N.D. Ohio 1994).

³⁰ *Solar Michigan*, 1988 U.S. Dist. LEXIS 16797, at *2.

³¹ *Id.* at *10; see also *World Travel*, 861 F.2d at 1026; *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989).

demonstrate irreparable injury.”³² Rather, as this Court stated in *Solar Michigan*, under the public-interest standard, the FTC need only show that there is a substantial likelihood that the statute has been violated, and that “the asset freeze is reasonably necessary in order to preserve the possibility of complete and meaningful relief at the conclusion of litigation.”³³ Indeed, “a district court’s equitable powers are more flexible when the public interest is involved.”³⁴ The FTC easily satisfies the elements for a TRO.

1. Low’s Internet Scheme is Deceptive in Violation of Sections 5 and 12

Here, the Commission has easily shown a substantial likelihood of success on the merits. Low’s Internet scheme constitutes false product claims in violation of Section 12 of the FTC Act, deceptive acts or practices in violation of Section 5 of the Act, and material omissions also in violation of Section 5.

a. False and Unsubstantiated Product Claims

Section 12 of the FTC Act prohibits the dissemination of materially misleading advertisements for the purpose of inducing, or with the likelihood to induce, the purchase of food or drugs.³⁵ The FTC may prove a violation by either showing that the claims are false or by showing that the defendant lacked a reasonable basis for making the claims in other words,

³² *World Travel*, 861 F.2d at 1029.

³³ *Solar Michigan*, 1988 U.S. Dist. LEXIS 16797, at *10.

³⁴ *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 761 (6th Cir. 1999) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960)).

³⁵ 15 U.S.C. § 52(b). Violations of Section 12 also constitute violations of Section 5. *Id.*

that the defendant lacked substantiation.³⁶ Section 5 of the FTC Act also prohibits false and unsubstantiated product claims.³⁷ Courts in other districts have enjoined as false weight-loss claims where there was no scientific evidence relied on by the medical community to support the weight-loss claims.³⁸

Here, Low's websites that promote acai berry invariably claim that the person who tried the product lost 25 pounds in four weeks with no special diet, and no intense exercise. These claims are false as, in Dr. Kushner's opinion, it is simply impossible to achieve that much weight loss in that time frame without changes in diet and exercise.³⁹ They are also unsubstantiated in that there is no reliable scientific literature to support the weight-loss claims.⁴⁰

b. Fake-News Format

Low's use of fake-news websites and bogus investigative reporting also constitute deceptive acts or practice in violation of Section 5 of the FTC Act.⁴¹ The standards for liability

³⁶ *American Home Products Corp. v. FTC*, 695 F.2d 681, 688 (3^d Cir. 1982); see, also, *FTC v. QT*, 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008); *FTC v. Sabal*, 32 F. Supp. 1004, 1007 (N.D. Ill. 1998); *FTC v. Direct Marketing Concepts*, 624 F.3d 1, 7-8 (1st Cir. 2010); *Removatron v. FTC*, 884 F.2d 1489, 1498 (1st Cir. 1989).

³⁷ *Solar Michigan*, 1988 U.S. Dist. LEXIS 16797, at *1 (citing *American Home Products*, 695 F.2d at 688).

³⁸ See, e.g., *FTC v. Phoenix Avatar, LLC*, No. 04C2897, 2004 U.S. Dist. LEXIS 14717, at *29-30 (N.D. Ill. July 29, 2004).

³⁹ PX 4 ¶ 8 (Kushner Dec.) (“[I]t is my opinion that acai berries will not cause any weight loss absent a reduction in caloric intake or an increase in exercise.”).

⁴⁰ *Id.* at ¶ 7.

⁴¹ 15 U.S.C. § 45(a).

under Section 5 are well established. As set forth administratively in *Cliffdale Associates*,⁴² and as followed by courts in Section 13(b) litigation, Section 5 condemns as deceptive any material representation, practice, or omission, likely to mislead consumers acting reasonably under the circumstances.⁴³ The Commission need not show intent to deceive, nor must it show individual reliance.⁴⁴ Rather, once the Commission shows that the representations were of the type ordinarily relied on by reasonably prudent persons, that they were widely disseminated, and that consumers purchased the product, the burden then shifts to the defendant to show there was no reliance.⁴⁵

Moreover, express claims and deliberately made implied claims are presumed material,⁴⁶ and “[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information to have an effect.”⁴⁷

Here, on any number of websites, Low has represented his organization as a legitimate

⁴² *In re Cliffdale Assoc.*, 103 F.T.C. 110, 164-65 (1984).

⁴³ *World Travel*, 861 F.2d at 1029; *FTC v. Atlantex Assoc.*, 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,252-53 (S.D. Fla. 1987); *Cliffdale Assoc.*, 103 F.T.C. at 164-65 (1984); *see also FTC Deception Policy Statement, appended to Cliffdale*, 103 F.T.C. at 174-83 (1984) (hereinafter *Deception Policy Statement*).

⁴⁴ *World Travel* 861 F.2d at 1029 (citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3^d Cir. 1976), and *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3^d Cir. 1976)); *Security Rare Coin v. FTC*, 931 F.2d 1312, 1316 (8th Cir. 1991).

⁴⁵ *World Travel* 861 F.2d at 1029 (citing *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)); *FTC v. Intl Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,709 (N.D. Cal. 1983).

⁴⁶ *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *In re Thompson Medical Corp.*, 104 F.T.C. 648, 816 (1984); *Deception Policy Statement*, 103 F.T.C. at 182.

⁴⁷ *Deception Policy Statement*, 103 F.T.C. at 182.

news organization, when it is not. He represents that an investigative journalist tried the product and achieved remarkable weight loss, when no investigation has been done. His websites are full of any number of express claims, and deliberately made implied claims, to convey false impressions. His fraudulent news format is deceptive in violation of Section 5.

c. Failure to Disclose

Finally, Low fails to adequately disclose his connection to the merchants whose products he advertises. Throughout his websites, Low deceptively gives the impression that he is independent from the merchants whose products he markets, and the fine-print disclosures he makes are not sufficient to correct that misleading impression. As the Commission's policy statement has long recognized, "[s]ome cases involve omission of material information the disclosure of which is necessary to prevent the claim, practice or sale from being misleading."⁴⁸ Courts in other jurisdictions have long applied this principle in finding deception.⁴⁹ Moreover, because claims must be judged according to their overall net impression,⁵⁰ no qualifying language can cure otherwise deceptive claims unless it is "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."⁵¹

⁴⁸ *Id.* at 176.

⁴⁹ *See, e.g., Transworld Accounts v. FTC*, 594 F.2d 212, 214 (8th Cir. 1979); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 532 (S.D.N.Y. 2000); *FTC v. U.S. Oil & Gas*, No. 83-1702-CIV-WMH, 1987 U.S. Dist. LEXIS 16137 at *47-48 (S.D. Fla. July 10, 1987).

⁵⁰ *Removatron*, 884 F.2d at 1497; *Beneficial Corp.*, 542 F.2d at 617 (3^d Cir. 1976); *FTC v. Davison & Assoc.*, 431 F. Supp. 2d 548, 560 (W.D. Pa. 2006).

⁵¹ *Removatron*, 884 F.2d at 1497; *see also FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. (continued...))

Thus, Low's deceptive claims cannot be cured by the fine-print disclosures that appear on his terms-and-conditions page. They are simply too hard to read to leave an accurate impression,⁵² and they appear well after dozens of links to the merchants' websites, making it likely that many if not most consumers never even see them.⁵³ Low's disclosures are thus ineffective, and his websites are fraudulent.

d. Low is Individually Liable

Under Commission law, individuals can be liable for violations of a corporation or other entity if the individual "actively participated in or had some measure of control over a corporation's deceptive practices."⁵⁴ Authority to control the deceptive practices is shown by active involvement in business affairs, including being a corporate officer or owner.⁵⁵ To require

⁵¹(...continued)
1985); *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992).

⁵² *Removatron*, 884 F.2d at 1497; *see also Cyberspace.com*, 453 F.3d at 1200 (difficult-to-read fine print not sufficient to correct misleading impression); *QT*, 448 F. Supp. 2d at 924 (same); *Deception Policy Statement*, 103 F.T.C. at 180-81 ("Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.").

⁵³ *See QT*, 512 F.3d at 864 (disclosure ineffective when it was buried several clicks away). Some of Low's websites also contain in fine print the word "advertorial." This word was at issue in an SEC case involving print advertising where the Middle District of Florida found that using it on some of the articles involved was not sufficient to inform consumers that the Defendants were paid for promotions. *SEC v. Corp. Relations Group*, No. 6-cv-Orl-28KRS, 2003 U.S. Dist. LEXIS 24925 at *26 (M.D. Fla. March 28, 2003).

⁵⁴ *FTC v. Int'l Computer Concepts*, 1994-2 Trade Cas. (CCH) ¶ 70,798 at 73,404 (N.D. Ohio 1994) (citing *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937)); *see also FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1996).

⁵⁵ *Int'l Computer Concepts*, 1994-2 Trade Cas. (CCH), at 73,405 (citing *World Travel*, 861 F.2d at 1031); *Amy Travel*, 875 F.2d at 573.

restitution by an individual, the Commission must also show that the individual “had or should have had knowledge or awareness of the misrepresentations.”⁵⁶ But knowledge need not be actual. Rather, “reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth” will suffice.⁵⁷ Further, principals of closely held entities involved in deception bear “a heavy burden of exculpation,” as they are in positions both to control the corporate activities and to know of the deceptive conduct.⁵⁸

Here, Defendant Low appears on corporate records as the incorporator and registered agent of Defendant Coulomb Media.⁵⁹ He established an account in his name and registered over 100 domain names, many of which have been identified with fake-news sites.⁶⁰ The only other name the Commission’s investigation connected to Defendant Coulomb Media’s operation is that of Joe Brooks, but as has discussed, Brooks appears to be an alias for Defendant Low.⁶¹ Low is thus not only responsible for the acts and practices of Defendant Coulomb Media, by registering over 100 domain names using the same images identified as different people selling different products, he had to have known that his websites were fraudulent. If he truly did not bother to know what was on his websites, then he was at least recklessly indifferent to the truth.

⁵⁶ *Int’l Computer Concepts*, 1994-2 Trade Cas. (CCH) at 73404.

⁵⁷ *See, e.g., FTC v. Network Servs. Depot, Inc.*, 617 F.2d 1127, 1138-39 (9th Cir. 2010); *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 636 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005).

⁵⁸ *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973).

⁵⁹ PX 1 Attach. L (Kraus Dec.).

⁶⁰ *Id.* at (Kraus Dec.).

⁶¹ *See supra* p. 4.

2. The Equities Tip Decidedly in the Commission's Favor

Once the Commission has shown a likelihood of success on the merits, the Court must then balance the private and public equities; in doing so, courts in other circuits have accorded greater weight to the public equities over private equities.⁶² The public equities here are compelling, given the need to stop Low's deceptive practices and to preserve assets for victim relief. On the other hand, as the Ninth Circuit explained, there is "no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment."⁶³

C. This Court Should Enter the FTC's Narrowly Tailored Proposed TRO

In fashioning appropriate injunctive relief, as this Court has stated in *Solar Michigan*, "[c]learly, section 13(b) of the FTC Act authorizes this Court to grant a permanent injunction to prevent violations of the Act, and it may use its equitable jurisdiction to preserve assets in order to make possible ultimate relief."⁶⁴ More recent cases in other circuits are in accord.⁶⁵ The Commission requests that the Court issue a TRO that, by prohibiting future law violations and preserving assets and documents, preserves the status quo and ensures that the Court can grant

⁶² See, e.g., *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (citing *FTC v. World Wide Factors, Ltd.*, 882 F.2d 334, 347 (9th Cir. 1989)); see also *World Travel*, 861 F.2d at 1029.

⁶³ *World Wide Factors*, 882 F.2d at 347.

⁶⁴ *Solar Michigan*, 1988 U.S. Dist. LEXIS 16797 at *2 (citing *H.N. Singer*, 688 F.2d at 1113 and *U.S. Oil & Gas*, 748 F.2d at 1432 (internal citations omitted)).

⁶⁵ See, e.g., *Affordable Media*, 179 F.2d at 1236-37; *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *U.S. Oil & Gas*, 748 F.2d at 1432; *Southwest Sunsites*, 665 F.2d at 718-19.

final relief.⁶⁶

1. Asset Preservation, Financial Statements, and Accounting

Part of the relief sought by the Commission in this case is restitution for the victims of Low's fraud. Low has lured countless consumers to his websites, where they have been bombarded with his misrepresentations and false claims. In order to preserve the possibility of restitution for victims who were deceived into buying the products Low purported to review, the FTC seeks the preservation of Low's assets by prohibiting extraordinary transfers. Also, to identify assets and ill-gotten gains resulting from Low's false and deceptive practices, the Court should order financial disclosure and an accounting.

Other district courts in this circuit have found that an asset freeze to be appropriate, where, when coupled with a showing of likely success on the merits, there is a possibility that assets will be dissipated.⁶⁷ Other Courts are in accord. As the Seventh Circuit has stated, when a district court determines that it is "probable that the FTC [will] prevail in a final determination of the merits, [it has] a duty to ensure that . . . assets . . . [are] available to make restitution to injured customers."⁶⁸ Sections III and IV of the FTC's Proposed TRO require each Defendant to preserve assets and provide the FTC with a completed financial statement and an accounting, respectively. These sections are necessary and appropriate to locate ill-gotten gains and to prevent the concealment or dissipation of assets pending a final resolution of this litigation.

⁶⁶ A Proposed TRO has been filed with the Motion.

⁶⁷ *FSLIC v. Quinn*, 711 F. Supp. 366, 379 (N.D. Ohio 1989) (citing *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989)).

⁶⁸ *World Travel*, 861 F.2d at 1031.

2. Prohibited Business Activities and Additional Relief

The FTC's Proposed TRO also contains provisions necessary for halting Low's illegal conduct and maintaining the status quo. Sections I and II prohibit Low from further violating the FTC Act, while Section V requires him to post notice of the lawsuit on his websites. Section VI requires each Defendant to preserve records and report new business activity. Section VII allows for expedited discovery of information relevant to a preliminary injunction hearing. These are necessary provisions to stop Low's scam and to help identify the scope of unlawful practices, other participants, and the location of assets.

V. CONCLUSION

For the foregoing reasons, this Court should enjoin Low's false and unsubstantiated claims concerning acai berry products, and enjoin Low's deceptive use of fake-news websites. To identify assets and ill-gotten gains resulting from Low's false and deceptive practices, the Court should order financial disclosure and an accounting. To prevent further consumer injury from occurring before a hearing on a preliminary injunction can be held, the Court should schedule a hearing on the Commission's motion for a Temporary Restraining Order as soon as is practical.

Date: April 15, 2011

Respectfully submitted,

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